*Supreme Court of Pennsylvania.*

## PENNSYLVANIA RAILROAD CO. v. WEILLER.

A stipulation in a bill of lading that an agreed valuation shall cover loss or damage from any cause whatever, does not relieve the carrier from liability for the actual value of goods lost, when the loss has been caused by his own negligence.

But in such case the owner of the goods which have been lost through the negligence of the carrier, may recover from him their full actual value, notwithstanding the fact that a less value was agreed upon and that in consideration of such agreement a lower rate of freight was charged.

MITCHELL, J., dissents.

Error to the Court of Common Pleas No. 1, of Philadelphia County.

Trespass, by Hermann Weiller against the Pennsylvania Railroad Company to recover damages for the loss of four barrels of whiskey, caused by the alleged negligence of defendant. Plea, not guilty.

Upon the trial, before BREGY, J., it appeared that on June 15, 1887, the defendant received from Moore & Sinnott, at Belle Vernon, ten barrels of whiskey, to be carried over the line of its road to Philadelphia, and delivered to Hermann Weiller, the plaintiff, the owner and consignee thereof. While the shipment was in the possession of the Pennsylvania Railroad Company, four barrels of the whiskey were lost or destroyed by a wreck occurring on defendant's railway. The whiskey was shipped under a bill of lading, of which the material clauses were as follows :—

Received, June 15, 1887, from Moore & Sinnott, the following described property, in apparent good order (contents, and condition of contents, of packages unknown), to be transported to and delivered at the regular freight station of the company at Philadelphia, Pa., subject to all the *conditions* following and *upon the back of this receipt*, and to be delivered in like good order, subject to the said conditions, upon payment of *freight* and advanced charges, and upon payment also of all charges accruing under the said conditions. . . .

*It is mutually agreed*, and it is the spirit of this *contract*, that the Pennsylvania Railroad Company, hereinafter designated the carrier, shall transport the above-named merchandise with all due care and dispatch to

its destination, or to the terminus of its line in the direction of destination, and tender it to the consignee, or to the connecting carrier, as the case may be, in the same apparent good order and condition in which it was receipted for at point of shipment, and in case of loss from any cause within the carrier's reasonable control, shall pay for the same at the net invoice price, freight charges added if paid (unless a lower value of the articles has been agreed upon with the shippers, and such value noted hereon, or same is determined by the classification upon which the rates are based), and in case of damage through the negligence of the carrier's servants, shall pay a just assessment of same, the carrier to have the full benefit of any insurance that may have been effected upon or on account of said goods. . . .

The carrier shall not be liable for loss or damage by causes beyond its reasonable control, by *fire* from any cause and wheresoever occurring; by riots, strikes, or stoppages of labor, or by any of the causes incident to transportation, such as chafing, heating, freezing, leakage, rust or any other reason not directly traceable to the negligence of the carrier's servants. . . .

And, finally, in accepting this shipping receipt, the shipper, owner and consignee of the goods, and the holder of the shipping receipt, agree to be bound by all its stipulations, exceptions, and conditions, whether written or printed, as fully as if they were all signed by such a shipper, owner, consignee or holder.

*When a valuation* as agreed upon shall be named upon this shipping receipt, it is distinctly understood that such valuation shall cover loss or damage from *any cause whatever*.

By a provision of the bill of lading the whiskey was valued at twenty dollars per barrel. The evidence showed that this provision was inserted by the shippers, and there was no question in the case as to their knowledge of the contents and terms of the bill of lading; that there were two rates of freight fixed by the company for the carriage of freight of this character, to wit, thirty-three cents per hundred pounds, and twenty-eight cents per hundred pounds, and that the lower rate was given to shippers at their own request, upon their entering into a contract, which was written into the bill of lading, that in case of any loss or damage no greater sum should be recovered than the valuation fixed therein, being in this instance a lower valuation than the actual value of the whiskey. The defendant offered to pay the plaintiff for the barrels of whiskey destroyed at the valuation fixed in the bill of lading, to wit, twenty dollars per barrel. The plaintiff refused this offer.

Defendant requested the Court to charge—

(1) A common carrier is entitled by agreement with the shipper, and in consideration of an undertaking to transport merchandise at a low rate of freight, to limit its liability by fixing a value upon the merchandise, beyond which it cannot be held responsible. This having been done in the present case, there can be no recovery beyond the value of the whiskey fixed in the bill of lading, to wit, twenty dollars per barrel.

Refused.

(2) Under all the evidence in this case there can be no recovery by the plaintiff beyond the amount of twenty dollars per barrel for the barrels of whiskey not delivered, with interest upon that amount from the date when the delivery should have taken place.

Refused.

The Court charged the jury as follows :—

" Under my view of this evidence and the papers in the case, I instruct you to find for the plaintiff for the value of the whiskey less the freight; that is $257.27 less $11.77, with interest thereon."

Verdict accordingly and judgment thereon. Defendant then took this writ, assigning for error the charge of the Court and the refusal of its points.

*George Tucker Bispham*, for plaintiff in error.

*Edward H. Weil*, for defendant in error.

GREEN, J., April 21, 1890. In the case of *Elkins* v. *Empire Transportation Co.* (1876), *81 Pa. 315, no question of negligence, or of the carrier's right to limit his liability for his acts of negligence, was raised, discussed, or decided either in the Court below or in this Court. The reporter says the cause of action set out in the declaration was the loss of certain high wines delivered to defendant, but lost by negligence. This is the only reference to the subject of negligence to be found in the entire report of the case. The record shows that the case was not tried upon any theory of negligence, but exclusively upon the terms, and interpretation of the contract as contained in the bill of lading. No

question was made upon the subject of the right of the carrier to limit his liability for the loss occurring by his own negligence, and we are bound to assume that the facts of the case did not give rise to such a question. Nothing was said upon that subject either in the argument of counsel, or in the charge of the Court below, or in the opinion of this Court. It was for this reason that no reference was made to this case in the opinion of this Court in the case of *Grogan & Merz* v. *Adams Express Co.* (1886), 114 Pa. 523. The same reason is applicable now. It may be that the accident in the Elkins case was not the result of any negligence of the carrier. Judging from the names of the counsel concerned, it is almost certain that if the facts had developed a case of negligence, and the question of the right of the carrier to limit his liability for acts of negligence, that question would have been promptly raised, discussed and decided.

In the present case the question does arise under the conditions annexed to the bill of lading. Many enumerated causes of loss are expressly excepted, such as fire, riots, strikes, heating, freezing, leakage, rust, etc., and as to these the right of the company to limit its liability must be affirmed in accordance with numerous decisions of this and other Courts. But the final clause of the conditions stipulates that, "When a valuation as agreed upon shall be named upon this shipping receipt, it is distinctly understood that such valuation shall cover loss or damage from any cause whatever." As this necessarily includes loss arising from negligence, and as the testimony tended to establish a loss by negligence, the question of the efficacy of the clause under consideration to relieve the company from liability for negligence beyond the agreed value, necessarily arises. Upon that subject we have so recently expressed ourselves in the case of *Grogan & Merz* v. *Adams Express Co.*, *supra*, that we think it unnecessary to repeat either the text or substance of the opinion there announced. So far as the question at issue is concerned, we can see no difference between that case and this.

Judgment affirmed.

MITCHELL, J., (*dissenting.*) To allow a shipper to value his goods for purposes of freight charges, etc., at one price, and then when they are lost, to recover, as in this case, three times his own agreed value, is a direct premium on fraud such as no Court ought to sanction. The public policy which prohibits a common carrier from contracting against the negligence of his employes, or, expressing the rule in commercial language, which prohibits a shipper from becoming his own insurer against accidental loss, if he so chooses, by paying a lower rate of freight, was founded upon a condition of things which has passed away, and the rule itself should, in my opinion, be materially modified, if not abrogated altogether in regard to goods. That, however, is an alteration of the law which is legislative in its scope and cannot be properly made by the Courts. I am, therefore, in favor of adhering to the rule as far as it has been settled by the decisions, but would not extend it in the slightest degree. In this case the public were offered two plans: a full liability at a regular rate, or a stipulated maximum liability at a reduced rate. The plaintiff, with full knowledge, chose the latter. Upon the reasonableness of such a regulation, the argument of Lord BLACKBURN, in *Manchester S. & L. Ry. Co.* v. *Brown* (1883), L. R. 8 App. Cases, 703, 712, is in my judgment unanswerable. "When there has been a fixed rate, if it be shown in point of fact that although people can have their goods reasonably carried at that rate, they do enter into agreements of this sort to have them carried at another rate, that is extremely strong evidence that the agreement is reasonable." Instead of "extremely strong," I should say conclusive. The observations of Lord BRAMWELL, in the same case, are also worthy of careful reading.

Because I believe this case to be a step beyond the previous decisions on the subject, I am compelled to dissent from this judgment.

STERRETT and WILLIAMS, JJ., absent.

The doctrine which is followed by the majority of the Court in this case, is in consonance with a line of Pennsylvania decisions, beginning with *Farnham* v. *Camden & Amboy RR. Co.* (1867), 55 Pa. 53. In that case the plaintiffs had shipped from Philadelphia for New York certain bales of goods. Subject to a condition in the bill of lading that "the responsibility of the company as carriers of the within named goods is hereby limited so as not to exceed $100 for every 100 lbs. weight thereof, and at that rate for a greater or less quantity, the shipper declining to pay for any higher risk." The goods were carried in safety to New York and deposited under a shed upon the wharf of the railroad company, where they were destroyed by fire, the company, however, being chargeable with no negligence. The Court held that by the special contract limiting the liability of the carrier, its liability ceased to be that of an insurer and became that of a bailee for hire. "It does not admit of a doubt," said THOMPSON, J., "that a common carrier may by a special contract, and perhaps by notice, limit his liability for loss or injury to goods carried by him, as to every cause of injury, excepting that arising from his own or the negligence of his servants. A great variety of cases cited in the very able argument of the learned counsel for the defendants [JAMES E. GOWEN and ASA I. FISH, one of the original editors of the AMERICAN LAW REGISTER] established this as the rule in England, from *Southcote's Case*, 4 Coke's Rep. 84, A. D. 1601, down to *The Peninsular and Oriental Steam Navigation Co.* v. *The Hon. Farquhar Shand*, 11 Jurist, 771, in 1865. The same rule generally holds in the several States in this country, as will appear in Story on Bailments, 549, notes a and b; *Dow* v. *New Jersey Steam Navigation Co.* (1854), 1 Kern (N. Y.) 484; and in the Supreme Court of the United States in *York Co.* v. *The Central RR. Co.* (1866), 3 Wall. (70 U. S.) 107. This has long been the rule in this State, as is shown by *Bingham* v. *Rogers* (1843), 6 W. and S. (Pa.) 495; *Laing* v. *Colder* (1848), 8 Pa. 479; *Camden & Amboy RR. Co.* v. *Baldauf* (1851), 16 Id. 67; *Chouteaux* v. *Leech* (1852), 18 Id. 224; *Goldey* v. *Pennsylvania RR. Co.* (1858), 30 Id. 242; and *Pennsylvania RR. Co.* v. *Henderson* (1865), 51 Pa. 315." But, he adds, "the doctrine is firmly settled that a common carrier cannot limit his liability so as to cover his own or his servants' negligence, nor do I suppose this possible of any bailee."

The next case was *American Express Co.* v. *Sands* (1867), 55 Pa. 140, decided at the same term of Court. Sands had shipped a barrel-saw by the Express Company from Pittsburgh to Irvine, Warren Co., Pa. When delivered, the saw was cracked and useless, and was therefore not accepted. Sands brought suit against the company, claiming as damages the full value of the saw and obtained a verdict for $475, upon which the Court entered judgment, notwithstanding the fact that the bill of lading had contained a stipulation that the Express Company was not to be held liable "for any loss or damage of any box, package or thing for over $50, unless the just and true value thereof is herein stated," there being no other statement of the value of the article shipped. Judge

(afterwards Chief Justice) THOMPSON, again delivered the opinion of the Court, which was as follows: "The principles involved in this case were all discussed in an opinion delivered at this term, *Farnham* v. *Camden & Amboy RR. Co.*, *supra*. It was there held that the company might limit the extent of liability in case of loss or injury, by a special contract or special acceptance of the goods to be carried, and thus become subject to the laws of bailment only; but that there could be no limitation of liability where the loss or injury resulted from the negligence of the company or its servants. Was there negligence in the case before us? There are numerous authorities cited in the case referred to, to show that when goods are lost or damaged while in the custody of the carrier under a special contract, and he gives no account of how it occurred, a presumption of negligence will follow of course. That is just the case before us, and hence it was right to hold the company liable to the extent of the full value of the saw."

The authority chiefly relied on by the majority of the Court in the principal case, is *Grogan* v. *Adams Express Co.* (1886), 114 Pa. 523. In that case the plaintiffs had shipped by the express company a package containing jewelry, valued at $198. The shipping receipt contained the following clause: "Nor in any event shall the holder hereof demand payment beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by them and so specified in this receipt." The Court below instructed the jury that this clause was a valuation and a binding contract, "a determination on the part of these parties as to the value of that package, and governs this transaction, unless the company took and appropriated it to its own use when it would have to pay the whole of it." In this instruction the Court expressly followed *Hart* v. *Pennsylvania RR. Co.* (1884), 112 U. S. 331, a case which will be discussed later in this annotation. In reversing the lower Court, the Pennsylvania Supreme Court (GREEN, J.), after commenting upon the three cases already cited, go on to say: "How is it in the case at bar? We think that it must be conceded that by the terms of the express receipt, signed by the company's agent, and delivered to, and accepted by the plaintiffs, the article shipped was valued at fifty dollars, and the company limited its liability to that sum, and this limitation would be a protection against liability beyond that amount, except for negligence. It is a contract almost precisely similar to the one upon which we passed, in the case of the *American Express Co.* v. *Sands*, *supra*, but is stronger than that in favor of the carrier, because it contains an express agreement that the article forwarded was valued at fifty dollars, which the receipt in the Sands case did not. But the Express Company in the present case failed to account for the non-delivery of the article, and hence a presumption of negligence arose, which they should have rebutted in order to escape liability, but they did not do so. * * * The learned Court further charged the jury that the defendant could limit its own liability, even as against its own negligence, and had done so by the re-

ceipt given to the plaintiffs when the goods were shipped. This was done in obedience to a decision of the Supreme Court of the United States in the case of *Hart* v. *Pennsylvania RR. Co.*, *supra*. An examination of that case shows that such is the law as declared by that Court, and if the decision were of binding authority upon us, we would be obliged to follow it. But our own decisions for a long time have established the opposite doctrine, until it has become firmly fixed in our system of jurisprudence. We could not depart from it now without overruling them all, and we are not willing to do so. The authorities upon the general subject are very numerous and conflicting. But with us the rule has been uniform and we prefer to adhere to it."

Prior to *Grogan* v. *Adams Express Co.*, the case of *Elkins* v. *Empire Transportation Co.* (1876), 81 *Pa. 315, had come before the same Court. This was an action for the value of fifty barrels of high wines, which had been shipped under a bill of lading containing a stipulation that the amount of loss or damage should "be computed at the value or cost of said goods or property at the place and time of shipment." The rate of freight, "50 cents per 100 pounds," and the words "Valuation $20 per barrel" were written in the blanks of the printed bill of lading. The report of the case shows that a portion of the goods were lost by an accident on the railroad, which does not seem to have been explained by the Transportation Company, so as to relieve it from the presumption of negligence, which was alleged in the declaration. The Court below charged that "if there was no contract limiting the responsibility, they (the carriers) are responsible for the whole loss; but if there was a contract, either express or implied, that they were not to be held liable beyond $20 per barrel, they are not liable beyond that." This instruction was assigned as error, but the Supreme Court affirmed the judgment, saying: "The valuation of $20 per barrel, written into the blank of the printed bill of lading, together with the stipulated freight at fifty cents per one hundred pounds, are controlling parts of the bill of lading, and not controlled by the printed stipulation that the amount of the loss or damage accruing and falling on the carriers shall be computed at the value or cost of the goods at the place and time of shipment. These parts, written into the printed bill, express the true contract of the parties, and the $20 per barrel must, therefore, be regarded as the value or cost, fixed by the parties in advance, as that to be treated as such, as of the time and place of shipment. This accords with the evidence that such freight, if left to be determined in value at the place and time of shipment, would not be carried at less than $1.60 per one hundred pounds. There was ample consideration, therefore, for the low valuation in this diminution of the freight as stipulated at fifty cents." This decision is apparently in conflict with the other Pennsylvania cases, but is distinguished in the majority opinion in the principal case.

In *Pennsylvania RR. Co.* v. *Raiordon* (1888), 119 Pa. 577, a still later case than those cited by the majority of the Court, it was said in an opinion by WILLIAMS, J.: "It is too late to deny that in

Pennsylvania a common carrier may limit his liability by a special contract. In *Atwood* v. *Reliance Transportation Co.* (1839), 9 Watts (Pa.) 87, GIBSON, C. J., recognized the rule as well established, although expressing grave doubts of its wisdom. In *Laing* v. *Colder* (1848), 8 Pa. 479, this Court again gave its assent to the rule, while BELL, J., by whom the opinion was delivered, expressed his sympathy with the doubt of Chief Justice GIBSON. The same rule has been held in many later cases, among which are *Powell* v. *Pennsylvania RR. Co.* (1859), 32 Pa. 414; *American Express Co.* v. *Sands* (1867), 55 Id. 140; *Pennsylvania RR. Co.* v. *Miller* (1878), 87 Id. 395; *Adams Express Co.* v. *Sharpless* (1876), 77 Id. 517; *Clyde* v. *Hubbard* (1879), 88 Id. 358. It is equally well settled that such limitation does not relieve the carrier from liability for his own negligence: *Pennsylvania RR. Co.* v. *Miller*, *supra*. The reason for this qualification of the power to limit liability rests on public policy."

The contrary doctrine to that of the Pennsylvania cases is broadly stated by the Supreme Court of the United States in *Hart* v. *Pennsylvania R. R. Co.* (1884), 112 U. S. 331. It is there said by Justice BLATCHFORD: "It is the law of this Court, that a common carrier may, by special contract, limit his common law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants: *New Jersey Steam Nav. Co.* v. *Merchants' Bank* (1848), 6 How. (47 U. S.) 344; *York Co.* v. *Central R. R. Co.* (1866), 3 Wall. (70 U. S.) 107; *The New York Central R. R. Co.* v. *Lockwood* (1873), 17 Id. (84 U. S.) 357; *The Southern Express Co.* v. *Caldwell* (1875), 21 Id. (88 U. S.) 264; *The Ogdensburg, etc. R. R. Co.* v. *Pratt* (1875), 22 Id. (89 U. S.) 123; *Bank of Kentucky* v. *Adams Express Co.* (1876), 93 U. S. 174; *The Grand Trunk Ry. Co.* v. *Stevens* (1878), 95 Id. 655. * * * To the views announced in these cases we adhere. But there is not in them any adjudication on the particular question now before us. It may, however, be disposed of on principles which are well established and which do not conflict with any of the rulings of this Court. As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed: 2 Kent's Comm. 603, and cases cited; *Relf* v. *Rapp* (1841), 3 W. & S. (Pa.) 21; *Dunlap* v. *International Steamboat Co.* (1867), 98 Mass. 371; *The N. Y. Cent. and Hudson River R. R. Co.* v. *Fraloff* (1879), 100 U. S. 24. This qualification of the liability of the carrier is reasonable, and is as important

as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses [the subject matter of the contract there in question], and had been told by the plaintiff the sum inserted in the contract. The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss. * * * The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

In the opinion quoted, the fact is recognized that the decisions in this country on the question there discussed, are at variance. It therefore becomes necessary, to a full comprehension of the present status of the law of the United States upon this subject, to make a careful examination of the rulings of the Courts of last resort in the various States.

In *Alabama*, the earlier decisions are in accord with the Pennsylvania rule, but of late the tendency has been in the contrary direction. Thus in the earliest case upon the subject, *Mobile & O. R. R. Co.* v. *Hopkins* (1868), 41 Ala. 486, the Court held that a limitation of value "may be made by special contract, but that a common carrier cannot exempt himself, by any such contract, from liability for the negli-

gence, willful default, or tort, of himself or his servants; and this upon the familiar principle, that whatever has an obvious tendency to encourage guilty negligence, fraud or crime, is contrary to public policy,"—citing *Camden & A. R. R. Co.* v. *Baldauf* (1851), 16 Pa. 67. To the same effect is the doctrine enunciated in *South & North Ala. R. R. Co.* v. *Henlein* (1875), 52 Ala. 606, and *Same* v. *Same* (1876), 56 Id. 368, although in these cases the Court assumed the right to judge whether the limitation was just and reasonable, and proportionate "to the real value of the animal [the subject-matter of the contract was a mule] and the amount of freight received." In *Ala. Great Southern R. R. Co.* v *Little* (1882), 71 Ala. 611, the law is very positively stated to be that "for the want of ordinary care, skill and diligence, from which a loss results, the carrier is liable for the value of the goods, as would be any other paid bailee or agent, and for exemption from this liability he has not stipulated, and the law will not tolerate that he should stipulate." This case is followed in *Louisville & N. R. R. Co.* v *Oden* (1885), 80 Ala. 38, but the latest case, *Louisville & N. R. R. Co.* v. *Sherrod* (1887), 84 Id. 178, appears to adopt the views of the United States Supreme Court. While this case attempts to distinguish the earlier Alabama decisions, its practical effect is to overrule them. It is there said by CLOPTON, J.: "Limitations as to value do not come under the operation of the rule, that a carrier cannot, by special contract, exempt himself from liability for the consequences of his own negligences, and ordinarily are not calculated to induce negligence. To the amount of the agreed valuation the carrier is responsible for loss occasioned by his neglect, or by any of the risks or accidents for which he is answerable. No public good will be subserved by denying to the parties the right to make such contracts. The shipper and the carrier may lawfully contract as to the valuation of the articles to be transported. Such special contract is in the nature of an agreement to liquidate the damages, proportionately to the compensation received for the carriage, and the responsibility of safely carrying and delivering. * * * When the value has been thus fairly agreed on, the carrier cannot recover a greater rate, and the shipper should not be allowed to take benefit of the reduced rate, if there is no loss, and to repudiate the contract, if there is a loss." The Court, however, states as a qualification of the rule, that "such special contracts may be avoided by wilful or wanton negligence in disregard of the rights of the shipper." Under this case, the Alabama rule must be held to sustain limitations of value by special contract, even where the loss is occasioned by negligence, provided it is not wilful or wanton.

In *Arkansas*, the rule of *Hart* v. *Pa. RR. Co.* has been expressly adopted and followed: *St. Louis, I. M. & S. Ry. Co.* v. *Lesser* (1885), 46 Ark. 236; *St. Louis, I. M. & S. Ry. Co.* v. *Weakly* (1887), 50 Id. 397. In the latter case the Court say: "As a general rule, the common carrier is bound to receive and carry that which is offered to him for transportation. He ought to be entitled to a reasonable reward for his services. As the risk of conveying property of considerable value is greater than that of small

value, the care required is, and the reward should be, greater. It is, therefore, reasonable and right that the value of the property shipped should be ascertained in order that the carrier may know the extent of his responsibility and the care and attention required, and fix the amount of his reward. * * * If, therefore, the measure of the liability of the carrier as agreed upon is adjusted by the reward to be received by the carrier under his contract, and the contract of shipment is fairly entered into, and no deceit is practised upon the shipper, the contract is reasonable as to the measure of liability and should be upheld." In both of these cases negligence was alleged.

[In *California*, the question would seem to be governed by the Civil Code of that State, which provides: "SEC. 2174, The obligation of a common carrier cannot be limited by general notice on his part, but may be limited by special contract.

"SEC. 2175, A common carrier cannot be exonerated by any agreement made in anticipation thereof, from liability for the gross negligence, fraud or willful wrong of himself or his servants.

"SEC. 2176, A passenger, consignor or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place and manner of delivery therein stated, and also to the limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks, or boxes is lost or injured, when the value of such property is not named; and also to the limitation stated therein to the carrier's liability for loss or injury to live animals carried. But his assent to any other modification of the carrier's obligations contained in such instrument, can be manifested only by his signature to the same." And it is further provided by—

"SEC. 2200, A common carrier of gold, silver, platina, or precious stones, or of imitations thereof, in a manufactured or unmanufactured state; of timepieces of any description; of negotiable paper or other valuable writings; of pictures, glass, or china ware; of statuary, silk, or laces; or of plated ware of any kind, is not liable for more than fifty dollars upon the loss or injury of any one package of such articles, unless he has notice, upon his receipt thereof, by mark upon the package or otherwise, of the nature of the freight; nor is such carrier liable upon any package carried for more than the value of the articles named in the receipt or the bill of lading." The recent case of *Scammon* v. *Wells, Fargo and Co.* (1890), 84 Cal. 311, was decided under this last section, the Court saying, "this measure of damages was adopted for the protection of the carrier, and does no injustice to the owner."

[In *Ormsby* v. *U. P. Ry. Co.* (1880), U. S. C. Ct., D. Colorado, 2 McCrary 48, there was a printed statement appended to the contract, headed "Rules and regulations for the transportation of live stock," which contained a schedule of amounts for which the company would be liable in case of damage or injury to such live stock, but such statement was not signed by the plaintiff or his agent. The Court therefore charged the jury that the statement was "not in the contract, * * * that the shipper is only bound by the stipula-

tions contained in the contract itself," and that such "rules and regulations for the transportation of live stock, printed at the head of this contract, * * are not a part of the contract with this plaintiff." In *Overland Mail & Express Co.* v. *Carroll* (1883), 7 Colo. 43, the Court said: "Appellant [the Company] could not make a binding contract with the owner, whereby it should be released from *all* liability in case of loss through negligence. Upon the same principle, it could not make a binding contract with him limiting its liability for loss occasioned by its negligence to fifty dollars, or to any other sum short of the actual value of the goods shipped, provided of course, that it had notice of such actual value when it received them."

[In *Lawrence and others* v. *The New York, Providence & Boston RR. Co.* (1869), 36 Conn. 63, there was a clause in the bill of lading "that no responsibility will be admitted under any circumstances to a greater amount upon any article of freight than two hundred dollars, unless upon notice given of such amount, and a special agreement therefor." The Court below charged the jury that the plaintiffs were entitled to the full value of the goods lost, but the appellate Court said, "This was clearly wrong. There was no claim or pretense of any gross negligence on the part of the defendants. They stored the goods in their depot, because the boat that evening was so full that that it could not take them. They had therefore to lie over for the boat of the following day; and in the meantime, they were destroyed by an accidental fire. And it is admitted that no notice was given of the value of the packages beyond two hundred dollars. We think, therefore, that the most the plaintiffs should have been permitted to recover is two hundred dollars for each package, instead of the full value of the packages." The case of *Welch* v. *The Boston & Albany RR. Co.* (1874), 44 Conn. 333, supports the rule that if a special contract relieves from all liability, it is void. If it limits responsibility to the exercise of ordinary care, * * the company have the benefit of their contract.

[In *Dakota*, the question is governed by the Civil Code, which provides, "§ 1261, The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract.

"§ 1262, A common carrier cannot be exonerated by any agreement, made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants.

"§ 1263, A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place and manner of delivery therein stated. But his assent to the other modifications of the carrier's rights or obligations contained in such instrument can only be manifested by his signature to the same." The case of *Hartwell* v. *N. P. E. Co.* (1889), 5 Dak. 463, was decided under these sections. There, the defendants sought to free themselves from liability on the ground that there was a special contract limiting the amount to be claimed, and the time within which notice of loss was to be

given, but the Court held there was no special contract, the plaintiff not having signed any document or paper, the receipt being a mere notice which would not limit the carrier's liability.

[In the *District of Columbia*, the carrier is held liable for the actual value of the goods, for in *Galt* v. *Adams Express Company* (1879), McArthur & Mackey (S. Ct. D. C.) 124, JAMES, J., says: "We hold * * that the principle of law which for considerations of public welfare forbids a common carrier to bargain in particular cases for complete exemption from responsibility for a violation of his duties, forbids him to impair his obligations to the community by bargaining in particular cases for an exemption from a considerable part of that responsibility. The ground on which the rule is based, that even the shipper's perfect consent can not wholly relieve the carrier, is, that the object which he undertakes to regulate by contract is not his own but a public right. * * The principle of the rule is that an agreement which operates to interfere with the public right touching the care and good faith of common carriers, is an agreement against public policy and welfare, and is, therefore, void; and as an agreement that his negligence shall be cheap must operate in this way, it necessarily falls within that principle." In this case the carrier's liability was limited to fifty dollars unless specially insured, and specified in the receipt.

[The Code of *Georgia* provides, "§ 2068, a common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given on tickets sold. He may make an express contract and will then be governed thereby." In *Southern Express Co.* v. *Newby* (1867), 36 Ga. 635, it was held under this section, that a receipt stipulating for exemption from liability and limiting the amount to be recovered to a certain amount per package, unless the real value be named at the time of shipment, was not a special contract within the section, and the company were therefore liable for the full value. To the same effect, *Purcell* v. *Southern Express Co.* (1866), 34 Id. 515.

[In *Illinois*, there would seem to be some conflict of opinion upon the question. *The Western Transportation Co.* v. *Newhall, et al.* (1860), 24 Ill. 466, was a case where there were certain qualifications and conditions on the back of the receipt, which the company contended formed a part of its contract, and there the Court say, "We believe the rule to be now well settled, that the common law liability of a common carrier cannot be so restricted, for notwithstanding the notice, the owner has a right to insist that the carrier shall receive and carry the goods, subject to all the incidents of his employment, and there can be no presumption when they are delivered to, and received by, the carrier, that the owner intended to abandon any of his legal rights, or yield to the wishes of the carrier. * * A common carrier being regarded as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from the act of God or the public enemy, it is not deemed salutary policy, that he shall escape this liability, by such general notices as we are considering. He may qualify his

liability by a general notice to all who may employ him, of any reasonable requisition to be observed on their part in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight and the like; as for example, that he will not be responsible for goods above the value of a certain sum unless they are entered as such, and paid for accordingly." Later cases would, however, seem to conflict with this opinion.

In *Adams Express Company* v. *Stettaners* (1871), 61 Ill. 184, goods were shipped from Chicago to New York, worth in fact $400, for which the company gave a receipt, limiting its liability to $50, in case of loss, of which the shipper had notice. The Court held that "even if it should be conceded that the shipper in this case must be considered as having assented to the terms of the bill of lading, we cannot hold the carrier excused from the exercise of reasonable and ordinary care. Courts have often had occasion to express their regret that common carriers have been permitted, even by contract, to discharge themselves from the obligations imposed by the salutary rules of the common law. It is very unreasonable in the carrier to say that it will, in no event, be liable beyond the sum of $50 in the absence of a special contract, though it may have received much more than that sum merely in the way of freight. If common carriers desire to deal fairly with the public, it would be very easy for them to require the shipper to specify the value of the merchandise and insert the amount in the receipt, making their charges in proportion to their liability. If the shipper should falsely state the value he could not complain at being held to his own valuation. In order to prevent the carrier from releasing himself, by contract, from all liability, courts have laid down the rule above stated that he cannot even by contract, exempt himself from the exercise of reasonable care."

[In *Oppenheimer & Co.* v. *U. S. Express Co.* (1873), 69 Ill. 62, Mr. Justice SHELDON in delivering the opinion of the Court, said: "A distinction exists between the effect of these notices by a carrier which seek to discharge him from duties which the law has annexed to his employment, and those, like the one in question, designed simply to insure good faith and fair dealing on the part of his employer—in the former case notice alone not being effectual, without an assent to the attempted restriction; while in the latter case, notice alone, if brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient. * * The common carrier is liable, as we find it frequently laid down, in respect to his reward, and the compensation should be in proportion to the risk. As the common carrier incurs a heavy responsibility, he has a right to demand from the employer, such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care which he ought to bestow in discharging his trust. And such a limitation of the carrier's liability as the one in question is held to be reasonable and consistent with public policy. But independent of the qualifying provision contained in the receipt, we should be inclined to sustain the defendant's claim of exemption from liability on the ground of a

want of good faith in not disclosing the value of the goods."

[The question was again raised in *Boscowitz et al.* v. *The Adams Express Co.* (1879), 93 Ill. 523, where the printed conditions on the receipt limited the carrier's liability to $50, "unless the just and true value" of the goods "is herein stated," and here the Court remarked, "It is a proposition so plain it will not be controverted, that defendant can claim no exemption from liability for the loss of the goods as a common carrier, except such as given by express contract. Neither in the written nor printed part of the receipt is there any express contract, making exemptions in favor of the defendant company. * * But admitting the conditions in the receipt were understandingly assented to by the shippers and became a binding contract between the parties, still defendant would be liable for the full value of the goods if the loss was owing to negligence on the part of the railroad company." In this case, SHELDON, J., delivered a dissenting opinion, following the lines taken by him in *Oppenheimer & Co.* v. *U. S. Express Co.*, *supra*.] In the recent case of *Chicago & N. W. Ry. Co.* v. *Chapman*, decided May 14, 1890, the Supreme Court say: "We are not unmindful that a contrary rule has been announced by courts of the highest respectability, and among them the Supreme Court of the United States. Notwithstanding the great respect we entertain for the very learned and eminent tribunals which have thus held, we are so strongly committed to the doctrine before announced that we feel compelled to adhere to the rule so long and firmly established in this State. And notwithstanding the persuasive weight of the rulings of these eminent tribunals, and of the reasons given for their decisions, we are still satisfied that the rule laid down in this State is based upon sound reason and a wise public policy, and is also supported by the decided weight of authority." The rule followed is stated to be that the carrier "may not exempt himself from liability for damages resulting from the gross negligence or wilful misconduct of himself or his servants," and this rule is held to apply to a stipulation as to value.

[In *Indiana* the question was raised in the case of *Rosenfeld* v. *The Peoria, D. & E. RR. Co.* (1885), 103 Ind. 121, where blanks in the bill of lading were filled up with characters almost illegible, but which on being interpreted meant "Leaks and outs excepted, $20 railroad valuation." This was followed by a statement thus, "in the event of loss or damage under the provisions of this agreement, the value or cost at the point of shipment shall govern the settlement of the same." The company contended that its liability was limited to $20. In the opinion of the Court it is said: "If they may contract against all liability for loss by means other than their own negligence or fraud, of course they may contract for the amount of recovery in such cases. But in case of a loss through their negligence or fraud, the same reasons, at first view, would seem to exist against contracts limiting the amount of recovery as exist against contracts for total exemption. * * If without any representation of value by the shipper, or a request of him for a statement of value, and without no-

tice and contract, and a valuable consideration, the carrier should place a value upon the articles received for carriage, that would not bind the shipper. In such case, he would clearly have the right to recover the full value of the articles lost by the carrier. If, on the other hand, for the purpose of getting reduced rates, the shipper should place a value upon the articles for carriage, or if by any kind of artifice he should induce the carrier to place a lower value upon the articles, and thus get reduced rates, it seems to be settled by the weight of authority that he could not recover beyond the value so fixed by him, or the value which by deceit he caused the carrier to fix. * * That carriers may, by fixing value, limit this common law liability, it must be shown that the shipper had some kind of knowledge of such fixing of value, and for a sufficient consideration consented thereto, or that his statements or conduct justified the carrier in so fixing the value." *The Adams Express Co.* v. *Harris, et al.* (1889), 120 Ind. 73 to the same effect.

[The public laws of *Iowa* relating to Railroads (Rev. Stat. 1888), provide: "2007, No contract, receipt, rule, or regulation, shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation, been made or entered into." By section 3371, the above provision is applied to warehousemen and common carriers. The case of *Hart* v. *The Chicago & N. W. Ry. Co.* (1886), 69 Iowa 485, was decided under this clause, the contract of carriage limiting the company's liability to one hundred dollars per horse. REED, J., there says: "Whether a common carrier, in the absence of any statute restricting his powers in that respect, can, by rule, regulation or contract, limit his liability for the property received by him for carriage, has been the subject of much discussion, and there is great conflict in the decision of the courts on the question. We have no occasion, however, in this case, to enter into that question. No one would question that in the absence of a contract limiting the amount of his liability, the shipper would be entitled, in case of the destruction or injury of the property under such circumstances as that the carrier was liable for the loss, to recover full compensation for injuries sustained. The statute quoted above prohibits the making of any contract that would exempt him from the liability of a common carrier which would exist if no contract, rule or regulation existed. If the statute is applicable to a contract in which the understanding is to transport the property from this State into another State or territory of the United States, it cannot be doubted, we think, that the provision of the contract in question, by which it was sought to limit the liability of defendant for the horses to an amount less than the actual value of the property, is repugnant to its provisions, and consequently invalid." To the same effect, *McCune* v. *The B., C. R. & N. R. Co.* (1879), 52 Iowa 600.

In *Kansas*, the carrier is held responsible for the actual value of goods lost by his own negligence: *Kansas City, S. J. & C. B. RR. Co.* v. *Simpson* (1883), 30 Kan. 645. The Court adopts in this case the rea-

soning of the Supreme Court of the District of Columbia in *Galt* v. *Adams Express Co.*, *supra*, and adds, "While the provision in a bill of lading or contract between the shipper and the carrier, that the latter will not be liable beyond a certain sum expressed in the contract, may be valid to limit the liability of the carrier as an insurer, a condition of this character which seeks to cover the negligence of the carrier is void."

In *Kentucky*, the same rule has been followed: *Orndorff* v. *Adams Express Co.* (1867), 3 Bush. (Ky.) 194.

[In *Little et al* v. *Boston & Maine RR.* (1876), 66 Me. 239, the Court say: "When the article is of an extraordinary or unusual value the carrier would well be entitled to a higher rate of compensation, inasmuch as he might be reasonably held to a greater degree of care. * * It seems that common carriers may limit their liability by notice brought home to the owner of goods before, or at the time of their delivery, and expressly or impliedly assented to by him."

[The case *Brehme* v. *Adams Express Co.* (1866), 25 Md. 328, shows that in that State a carrier may by special contract limit the amount of his liability, for there the Court said, "The receipt executed by the appellee [the company] and accepted by the appellant, constituted the contract between the parties and both upon reason and authority, they are bound by its terms. The contents and value of the parcel were not disclosed to the appellee, and it was expressly agreed that its value was fifty dollars. Like in a valued policy of insurance, to which the contract in question is analogous, the amount of risk assumed by the appellee was fixed by the agreement, and must, in case of loss, be the measure of the appellant's recovery."

In *Massachusetts*, the rule is in direct accordance with that established by the United States Supreme Court: *Squire* v. *New York Central RR. Co.* (1867), 98 Mass. 239; *Graves* v. *Lake Shore & M. S. RR. Co.* (1884), 137 Id. 33. In the latter case the Court (MORTON, C. J.) say: "The plaintiffs voluntarily entered into the contract with the defendant; no advantage was taken of them; they deliberately represented the value of the goods [high wines] to be $20 per barrel. The compensation for carriage was fixed upon this value; the defendant is injured and the plaintiffs are benefited by this valuation, if it can now be denied. The plaintiffs cannot recover a larger sum without violating their own agreement. Although one of the indirect effects of such a contract is to limit the extent of the responsibility of the carrier for the negligence of his servants, this was not the purpose of the contract. We cannot see that any considerations of a sound public policy require that such contracts should be held invalid, or that a person who in such contract fixes a value upon his goods which he entrusts to the carrier, should not be bound by his valuation." These cases were expressly affirmed in *Hill* v. *Boston, H. T. & W. RR. Co.* (1887), 144 Mass. 284.

[In *Michigan*, the Revised Statutes (ed. 1882, pages 843, 879), provide: "§ 3328, Any railroad company organized under this act, receiving freight for transportation, shall be entitled to the rights and

be subject to the liabilities of common carriers, except as herein otherwise provided; but no company shall be suffered to lessen or abridge its common law liability as a common carrier, unless by an agreement to be signed by both parties thereto."

"§ 3418. That no railroad company shall be permitted to change its common law liability as a common carrier, by any contract, or in any other manner, except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods or property to be carried." This last provision is contained in ch. 92, of Howell's Annotated Statutes (ed. 1882, page 879), and from its heading would seem to apply to Railroad Companies in general, and not like the previous section to those organized under the Statute therein referred to. The section is headed "Liability of Railroad Companies as Common Carriers."

The *Minnesota* Supreme Court is apparently in accord with the principal case, intimating, however, that an agreement made in good faith to liquidate the damages recoverable in case of loss through the carrier's negligence, would be enforced. In *Moulton* v. *St. Paul, M. & M. Ry. Co.* (1883), 31 Minn. 85, that Court said: "The same reasons which forbid that a common carrier should, even by express contract, be absolved from liability for his own negligence, stand also in the way of any arbitrary preadjustment of the measure of damages, where the carrier is *partially* relieved from such liability. It would indeed be absurd to say that the requirement of the law as to such responsibility of the carrier is absolute, and cannot be laid aside, even by the agreement of the parties, but that one-half or three-fourths of this burden, which the law compels the carrier to bear, may be laid aside, by means of a contract limiting the recovery of damages to one-half or one-fourth of the known value of the property. This would be mere evasion, which would not be tolerated. Yet there is no reason why the contracting parties may not, in good faith, agree upon the value of the property presented for transportation, or fairly liquidate the damages recoverable in accordance with the supposed value. Such an agreement would not be an abrogation of the requirements of the law, but only the application of the law as it is, by the parties themselves, to the circumstances of the particular case. But that the requirements of the law be not evaded, and its purposes frustrated, contracts of this kind should be closely scrutinized."

[In this case, the general regulation attached to the contract, provided that the company should not be liable beyond one hundred dollars per head on horses and valuable live-stock, except by special agreement. This clause, the Court stated, "is plainly opposed to the law as established, so far as regards the negligence of the carrier. As a regulation, it is, therefore, of no effect. The law declares that the carrier shall be liable to the full extent of the value of the property, although there be no special agreement."

The Supreme Court of *Mississippi* has recently passed upon the question under consideration, taking its stand in direct accordance with the doctrine of the principal

case: *Southern Express Co.* v. *Seide*, S. Ct. Miss., June 2, 1890. The Court say in this case: "Stipulations in contracts with common carriers of similar import with that under consideration have frequently been presented to the Courts for decision, and it is very generally held that their effect is to exempt the carrier from a greater responsibility, only when the loss occurs without the negligence or fault of the carrier; but where the loss springs from negligence, the full value may be recovered, notwithstanding the stipulation." To the same effect are the earlier cases of *Southern Express Co.* v. *Moon* (1863), 39 Miss. 822, and *Chicago, St. L. & N. O. RR. Co.* v. *Abels* (1883), 60 Id. 1017.

In *Missouri*, the question under discussion was considered in *Harvey* v. *Terre Haute & I. RR. Co.* (1881), 74 Mo. 538, where the Court said: "We do not regard a a contract limiting a right of recovery to a sum expressly agreed upon by the parties as representing the true value of the property shipped, as a contract in any degree exempting the carrier from the consequences of its own negligence. Such a contract fairly entered into, leaves the carrier responsible for its negligence, and simply fixes the rate of freight and liquidates the damages. This we think it is competent for the carrier to do."

[In the more recent case of *McFadden* v. *The Missouri Pacific Ry. Co.* (1887), 92 Mo. 343, the bill of lading stipulated that the defendant should not be liable for more than one hundred dollars per head for the mules, which were carried at a reduced rate. Here RAY, J., after commenting upon and examining *Hart* v. *Pennsylvania RR.*, *supra*, *Moulton* v. *St. Paul M. & M. Ry. Co.*, *supra*, and *U. S. Express Co.* v. *Backman*, *infra*, remarks: "Even under the rule declared in the former [*Hart* v. *Pennsylvania*] class of decisions, these provisions thus employed and resorted to by common carriers to restrict their liability, are to be tested by their fairness, justice and reasonableness. * * The reduced rate, if such it was, was the consideration for the exemption from liability beyond the one hundred dollars, even in case of injury and loss from the defendant's negligence." In distinguishing the case from *Hart* v. *Pennsylvania RR.*, he says: "In [that case] * * the discussion was had upon the terms of the bill of lading alone, and as the Court say, 'without any evidence upon the subject, and especially in the absence of evidence to the contrary,' and under the qualifications it contains, we cannot regard it as controlling authority in a case where the evidence clearly shows absence of reduced or lower rate, or any graduation of compensation to the valuation. On the one hand it may be, as is there said, unjust, unreasonable, and repugnant to sound principles of fair dealing, for the shipper to reap the benefits of a contract, by which he secures a lower rate than the carrier might reasonably charge for the service rendered, if there be no loss, and to repudiate it in case of loss. Where the shipper procures the lawful rates of the carrier to be reduced in express consideration of the agreed value, upon which the compensation is based, he is, under numerous authorities, * * held to be estopped to say the value is greater when the loss occurs. On

the other hand, it would, we think, be no less unfair, unreasonable and unjust that the carrier, without any sacrifice of his interests, or lawful demands, or diminution of his lawful charges, should secure, without any consideration therefor, such important advantages and release of liability to which he would otherwise be subjected under the law."

[The Compiled Statutes of *Nebraska* (ed. 1889) provide—"SEC. 111. Any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers. And whenever two or more railroads are connected together, the company owning either of said roads receiving freight to be transported to any place on the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight to the consignee of said freight, in the same order in which such freight was shipped."

[Ch. 72, Id. page 628, provides, "SEC. 5, No notice either express or implied, shall be held to limit the liabilities of any railroad company as common carriers, unless they shall make it appear, that such limitation was actually brought to the knowledge of the opposite party and assented to by him or them, in express terms, before such limitation shall take effect."

[In Article XI. of the Constitution of this State it is provided, *inter alia*, by SEC. 4, "The liability of railroad corporations as common carriers, shall never be limited." In *The Atchison & Nebraska RR. Co.* v. *Washburn & Leihy* (1876), 5 Neb. 117, the Court held an agreement limiting the carrier's liability to be "in violation of law and against public policy," and could "not lessen the plaintiff's responsibility as common carrier, nor remove its liability for negligence of its servants."

[Two cases have very recently been decided in the Supreme Court of *New Hampshire* upon this question, *Duntley* v. *Boston & M. RR.*, July 26, 1890; and *Durgin* v. *American Express Co.*, July 25, 1890; they follow the rule as laid down in *Hart* v. *Pennsylvania RR. Co.*, *supra*.

[In *New Jersey*, the rule as laid down in *Hart* v. *Pennsylvania RR. Co.*, *supra*, is followed: *The Lydian Monarch* (1885), D. Ct., D. N. J., 23 Fed. Repr. 298.

[The question was raised in *New York*, in the case of *Magnin et al.* v. *Dinsmore* (1874), 56 N. Y. 168, where the receipt contained, *inter alia*, the following clause: "It is further agreed, and is part of the consideration of this contract, that the Adams Express Company are not to be held liable or responsible for the property herein mentioned for any loss or damage arising from the dangers of railroad, ocean, steam, or river navigation, leakage, fire, or from any cause whatever, unless specially insured by them and so specified in this receipt; which insurance shall constitute the limit of the liability of the Adams Express Company in any event; and if the value of the property above described is not stated by the shipper, the holder hereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss or detention of, or damage to the property aforesaid." JOHNSON, J., who delivered the opinion of the Court, said; "The first question which

arises in this case is as to the meaning of the contract under which the plaintiffs claim to recover against the defendants; for it is no longer open to question, in this State, that in the absence of fraud or imposition, the rights of carrier and shipper are controlled by contract, in writing, delivered to the shipper by the carrier, at the time of the receipt of property for transportation." But in concluding he adds, "The terms of these contracts are very much under the control of the carriers, and they may justly be required to express in plain terms the entire exemption for which they stipulate. * * If it be desired to cover losses by negligence, it is not too much to say that the purpose must be clearly expressed." The next case in which this question was raised, was *Steers* v. *The Liverpool, New York and Philadelphia Steamship Co.* (1874), 57 Id. 1, which directly followed the ruling of the Court in *Belger* v. *Dinsmore, infra.* In *Westcott et al.* v. *Fargo, President, etc.* (1875), 61 Id. 542, the Court referring to the cases above mentioned, said: "This point must now be regarded as settled by recent decisions in this Court [The Commission of Appeals] and in the Court of Appeals. The result of these cases is, that it is lawful for a carrier to make such a contract as was entered into in the present case, exempting him from liability and that he may, by *clear* and *distinct expressions*, relieve himself from losses occasioned by his own negligence. On the other hand, general words, 'such as that he will not be liable for loss, or detention, or damage,' are not to be construed to extend to losses, etc., occasioned by negligence."] In *Magnin* v. *Dinsmore* (1877), 70 Id. 410, ALLEN, J., says: "The act which will deprive of the benefit of a contract for a limited liability fairly made, must be an affirmative act of wrong doing, not merely ordinary neglect in the course of the bailment. It need not necessarily be intentional wrong doing, but the mere omission of ordinary care in the safe keeping and carriage of the goods is not the misfeasance intended by the authorities."

[To the same effect is the earlier case of *Belger* v. *Dinsmore* (1872), 51 Id. 166, where the receipt given limited the defendant's liability to fifty dollars unless otherwise expressed, and the Court held that "a party accepting such an instrument * * declares his assent by such acceptance, to those terms and conditions."

[In *North Carolina*, the rule is established that a common carrier being an insurer against all losses and damages, except those occurring from the act of God or the public enemy, may by special notice brought to the knowledge of the owner of goods delivered for transportation, or by contract, restrict his liability as an insurer, where there is no negligence on his part. He cannot by contract even limit his responsibility for loss or damage resulting from his want of the due exercise of ordinary care. A contract restricting the liability of the carrier must be reasonable, and not calculated to ensnare or defraud the other party. *Capehart* v. *Seaboard & Roanoke RR. Co.* (1879), 81 N. C. 438. Here the bill of lading stipulated that in case of any claim for damages to the articles mentioned therein, the extent of such damage should be adjusted before the removal from

the station, and claim therefor made in thirty days, and the Court held it unreasonable. In every case, the restriction must be brought to the knowledge of the consignor, and a restriction in a bill of lading given at the time of the delivery of the goods, and received by the shipper without remonstrance or objection, is equivalent to an express contract: *Whitehead* v. *Wilmington & Weldon RR. Co.*, 87 N. C. 255. In *Weinberg* v. *Albemarle & Raleigh RR. Co.* (1884), 91 Id. 31, the Court said, "the bill of lading was evidence of a contract between the plaintiff and defendant, and the former is bound by all the stipulations therein that were lawful and did not contravene public policy in respect to common carriers."

The *Ohio* Supreme Court is in full accord with the Pennsylvania cases. The question under consideration arose in *U. S. Express Co.* v. *Backman* (1875), 28 Ohio St. 144, where the Court said: "The Ohio cases hereinbefore cited make it clear that common carriers cannot, by contract, exempt themselves from liability for full damages for a loss occasioned by their own negligence or that of their servants. No more can they legally stipulate for a partial exemption from liability caused by like negligence. The public policy that avoids a contract for total exemption, will hold a contract void that provides for partial exemption in such case. The fact that by reason of such contract the carrier undertook the transportation of the goods for a diminished reward will avail him nothing."

[The General Statutes (ed. 1882, p. 389) of *South Carolina* provide —"SEC. 1333. No public notice or declaration shall limit or in any wise affect the liability at common law of any public common carriers for or in respect of any goods to be carried and conveyed by them; but they shall be liable, as at common law, to answer for the loss of or injury to any articles and goods delivered to them for transportation, any public notice or declaration by them made and given contrary thereto or in anywise limiting such liability notwithstanding." Under this section the case of *Piedmont Manufacturing Company* v. *Columbia & Greenville RR. Co.* (1882), 19 S. C. 353, held "that common carriers in this State cannot limit their common law responsibility by any * * special contract for or in respect of any goods to be carried by them."

In *Tennessee*, the question of the effect of contracts containing a stipulated valuation has recently been elaborately considered in the case of *Louisville & N. RR. Co.* v. *Wynne*, S. Ct. Tenn., Jan. 2, 1890. After stating the general rule that "common carriers may limit their liability by special contract, provided always, that such limitation shall not operate to exempt them from the consequences of their own negligence, or that of their servants," the opinion of the Court in this case goes on to say: "Is the limitation in the contract before us within the prohibition of this eminently just and generally accepted principle? Manifestly the stipulation does not contemplate total exemption from liability; it only provides for partial or limited exemption. Upon that distinction, the nice and important question arises, can a stipulation of the latter character stand before the law when one of the former kind

cannot? Or, to state the same question differently, and so as to apply it more directly to the facts of this case, the rule of law being established, as we have seen it is, that the defendant company could not lawfully have contracted with the plaintiff that it would in no event be liable for any part of the value of the mare, if lost or destroyed, can the limitation of its liability to $100 be upheld in the courts, if it should appear that her death resulted from the negligence of the company, and that she was in fact worth eight times that amount, as the jury found her to be? We unhesitatingly answer, 'No.' The carrier cannot by contract excuse itself from liability for the whole nor any part of a loss brought about by its negligence. To our minds it is perfectly clear that the two kinds of stipulation —that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground, and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so, the same considerations of public policy operating in each case. With great deference for those who may differ with us, we think it entirely illogical and unreasonable to say, that the carrier may not absolve itself from liability for the whole value of property lost or destroyed through its negligence, but that it may absolve itself from responsibility for one-half, three-fourths, seven-eighths, nine-tenths, or ninety-hundredths of the loss so occasioned. With great unanimity the authorities say that it cannot do the former. If allowed to do the latter, it may thereby substantially evade and nullify the law, which says it shall not do the former, and in that way do indirectly what it is forbidden to do directly. We hold that it can do neither. The requirement of the law has ever been, and is now, that the common carrier shall be diligent and careful in the transportation of its freight, and public policy forbids that it shall throw off that obligation by stipulation for exemption in whole or in part from the consequences of its negligent acts. This view is sustained by sound reason, and also by the weight of authority." The Court attempts, however, in a subsequent portion of the opinion, to distinguish this case from *Hart* v. *Pennsylvania RR. Co.* (1884), 112 U. S. 331, for the reason that in the latter case "there was an agreed valuation stated in the contract as the basis of the carrier's charges and responsibility, and the Court very properly held that in such cases, the shipper was estopped to claim a greater sum than the agreed valuation. Though evident from the reasoning in the body of the opinion in the Hart Case, which may now be called the leading case in America, the Court is careful to say, in conclusion, that the decision is based alone upon the ground above stated." The stipulation in the Tennessee case was as follows: "And it is further agreed that should damage occur for which [the carrier] may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed" a specified sum. The distinction appears to be drawn from the fact that no abatement of freight charges was made in consideration of this stip-

ulation, and the Court intimates that, had such been the case, it would have followed the ruling in the Hart Case. Such a course would, however, seem inconsistent with the reasoning just quoted.

The Tennessee Supreme Court expressed the same view of the law in *Coward* v. *East Tennessee, V. & G. RR. Co.* (1886), 16 Lea 225.

[In *Texas*, the Civil Statutes (vol. 1, ed. 1888) provide: "ART. 278, Railroad companies and other common carriers of goods, wares and merchandise, for hire, within this State, on land, or in boats or vessels on the waters entirely within the body of this State, shall not limit or restrict their liability as it exists at common law, by any general or special notice, or by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, or in any other manner whatever, and no special agreement made in contravention of the foregoing provisions of this article shall be valid." In the case of *M. P. Ry. Co.* v. *Barnes & Co.* (1885), 2 Texas App. C. C. 507, the bill of lading stipulated that in the event of the loss of the property, "the value or cost of the same at the point of shipment" should govern the settlement, and the Court gave judgment for the market value of the goods, which was greater than the cost of the same.

[In *Vermont*, it would seem that the carrier may by an express contract limit his liability. "The express contract," says REDFIELD, J., "ought, perhaps, to be very clearly proved, and in water carriage is usually required to appear in the bill of lading. But a mere general notice, when brought to the knowledge of the owner, ought not, perhaps, to have that effect, unless there is very clear proof, that the owner expressly assented to that, as forming the basis of the contract:" *Farmers & Mechanics' Bank* v. *Champlin Transportation Co.* (1851), 23 Vt. 186. To the same effect, *Mann et al.* v. *Bichard et al.* (1867), 40 Id. 326.

[The question of the right of a common carrier to limit his liability is provided for by the Code of Virginia which provides: "SEC. 1296, No agreement made by a common carrier for exemption from liability for injury or loss occasioned by his own neglect or misconduct, shall be valid." The case of *Virginia and Tennessee RR. Co.* (1875), 26 Gratt. (Va.) 328, further supports the doctrine that a common carrier cannot by express contract relieve himself from liability in any degree from want of care or faithfulness in himself or his agents.

[In *Richmond & Danville R. Co.* v. *Payne*, decided in the Supreme Court of Appeals of Va., January 30, 1890, there was a special contract in the bill of lading for the carriage of horses at a reduced rate, and the amount to be claimed in case of loss was limited to one hundred dollars a horse. The Court said: "There is no doubt that a common carrier cannot lawfully stipulate for exemption from liability for the consequences of his own negligence or that of his servants. * * But that is not the question before us. The question here is whether, when a shipper signs a bill of lading, not exempting the carrier from liability for the negligence of himself or his servants, but limiting the amount in which the carrier shall be liable, in consideration of the goods being carried at reduced rates, such a con-

tract, fairly entered into, is valid and binding; and we see no reason why, when its terms are just and reasonable, it should not be. The test to be applied in all such cases is, Was the contract fairly entered into, and are its terms just and reasonable?" After examining the authorities and especially *Hart* v. *Pennsylvania*, *supra*, the Court continued: "This reasoning [*Hart* v. *Pennsylvania*], which seems to us sound, is supported by numerous decisions of courts of the highest respectability, and is decisive of the present case."

In *Wisconsin*, it has been held that the carrier cannot by special contract limit the amount of his liability, except in case of loss without fault upon his part: *Black* v. *Goodrich Transportation Co.* (1882) 55 Wis. 319.

The English case of *Manchester, S. & L. Ry. Co.* v. *Brown* (1883), L. R. 8 App. Cases, 703, cited by MITCHELL, J., in his dissenting opinion, was upon the general question of the power of a carrier to protect himself by special contract from the results of his and his servants's negligence, and was decided under the Railway and Canal Traffic Act of 1854 (17 and 18 Vict. c. 31, sect. 7), which provided that "every such company shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried to be just and reasonable. * * * Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him, or by the person delivering such animals, articles, goods, or things respectively for carriage." In the opinion of Lord BLACKBURN, however, the view is expressed that, irrespective of the Act, a carrier might by special contract, if fair and reasonable, protect himself from the negligence of his servants (p. 709). The English authorities on the general question are fully cited in this case, and in *Peek* v. *North Staffordshire Ry. Co.* (1863), 10 H. L. C. 473.

[In conclusion, it may be asked: Shall an agreed valuation limit the common law liability? and if so, how far shall printed or other notice of the terms upon which the carrier will transport the goods, be considered as agreed to?

[The first question receives a negative answer in Colorado (777–8), District of Columbia (779), Illinois (779), Iowa (782) by Statute, Kansas (782), Kentucky (783), Mississippi (784–5), Nebraska (786), Ohio (788), Pennsylvania (766, 771), South Carolina (788), Tennessee

(788) and Texas (790) by Statute: that is, in twelve States and one District. The Supreme Court of the United States answers this first question affirmatively (774), as do the Courts of Alabama (775), Arkansas (776), California (777) by the Civil Code, Connecticut (778), Dakota (778) under the Civil Code, Georgia (779) under the Code, Indiana (781), Maine (783), Massachusetts (783), Michigan (783) by Statute, Minnesota (784), Missouri (785), New Hampshire (786), New Jersey (786), New York (786), North Carolina (787), Vermont (790), Virginia (790), and Wisconsin (791): that is, twenty other States, counting Dakota as two, and the Supreme Court of the United States.

[So that the greater number of jurisdictions, as well as the better and more modern reasons, favor the views of the dissenting judge in the principal case. This renders an examination of the second question of greater moment. This second question growing out of the first, must be answered negatively in all cases where the agreed valuation does not limit the damages. Where the first question is answered affirmatively, the second does not necessarily receive a similar answer. So far as the circumstances of the cases have brought this subject to the attention of the judges, or the statutes have provided, there has been a declaration that express, special notice shall be considered as agreed to, in California (*supra*, page 777), Maine (783), New York (786), and North Carolina (787); but the consignor or consignee, is not bound by notice, nor except by his express agreement, in Dakota (*supra*, page 778), Georgia (779), Michigan (783), Minnesota (784), Missouri (785), and Vermont (790).

JAMES C. SELLERS.

## ABSTRACTS OF RECENT DECISIONS.

### BANKS AND BANKING.

*The restrictive indorsement* on a draft left with a bank for collection, is notice to the bank actually making the collection that the first bank is merely an agent to collect, and therefore the collecting bank can not acquire any better title to the draft, or its proceeds, than the first bank had: *Peck et al.* v. *First Nat. Bank*, U. S. C. Ct., S. D. N. Y., May 22, 1890.

### BILLS AND NOTES.

*One who buys* a promissory note made for a valuable consideration, payable "to the order of———" and fills in the blank, writing his own name therein, is a "subsequent holder" within the act of Congress determining the jurisdiction of the Circuit Courts of the United States, approved March 3, 1887, as corrected by the act of August 13, 1888, and cannot therefore sue thereon, the original holder and maker being in the State. Such a note is in effect payable to bearer: *Steel* v. *Rathbun*, U. S. C. Ct., D. Ore., May 23, 1890.

### CONSTITUTIONAL LAW.

*The boxes*, in which bottles of whiskey, each sealed up and packed in uncovered wooden boxes furnished by the express company, marked "To be returned," shipped from one State to another, are